INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	3
Argument	8
Conclusion	11

CITATIONS

Cases:

American Mail Line, Ltd. v. *Gulick*, 411 F.2d 696	8
Anchor Hocking Glass Corporation, 2 FPC 930	5, 7
Federal Power Commission v. *East Ohio Gas Co.*, 338 U.S. 464	7, 8, 9
Federal Power Commission v. *Union Electric Co.*, 381 U.S. 90	10
Interstate Natural Gas Co. v. *Federal Power Commission*, 311 U.S. 682	9
Jersey Central Power & Light Co., 9 FPC 717	5
Montana Power Co., The, 10 FPC 950	5
Permian Basin Area Rate Cases, 390 U.S. 747	10
Phillips Petroleum Co. v. *Wisconsin*, 347 U.S. 672	10
Public Service Electric and Gas Co. v. *Federal Power Commission*, 371 F.2d 1	9
Public Utilities Commission v. *Attleboro Steam & Electric Co.*, 273 U.S. 83	9
Reynolds Metals Company, unreported letter order March 27, 1959	5
Texas Eastern Transmission Corp. v. *Federal Power Commission*, 414 F.2d 344, certiorari denied, 398 U.S. 928	10
Transcontinental Gas Pipe Line Corp., 33 FPC 237, affirmed *sub nom. Public Service Electric and Gas Co.* v. *Federal Power Commission*, 371 F.2d 1, certiorari denied, 389 U.S. 849	5

Statutes: Page

Freedom of Information Act, 5 U.S.C. (Supp. V) 552-554 3
Section 552(b) 6, 7
Section 552(d) 6
Section 554(d) 11
Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717 *et seq.*:
Section 1(b), 15 U.S.C. 717(b) 2, 3, 7, 8, 9
Section 2, 15 U.S.C. 717a 3
Section 7(c), 15 U.S.C. 717f(c) 3

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-216

INTERNATIONAL PAPER COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 438 F.2d 1349. The opinion of the Federal Power Commission (Pet. App. 21a-34a) is reported at 42 F.P.C. 248, and its order denying rehearing and further disclosure (Pet. App. 34a-35a) is reported at 42 F.P.C. 697. The opinion of the district court (Pet. App. 37a-45a) is not yet reported.

JURISDICTION

The judgments of the court of appeals (Pet. App. 19a-20a) were entered on March 2, 1971. The petition for a writ of certiorari was filed on May 28, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act (15 U.S.C. 717r(b)).

QUESTIONS PRESENTED

1. Whether the interstate transportation of gas by an industrial consumer for its own use is subject to the jurisdiction of the Federal Power Commission under Section 1(b) of the Natural Gas Act.

2. Whether certain staff memoranda to the Commission were exempt from disclosure under the Freedom of Information Act.

3. Whether the court below properly rejected an alleged separation of functions claim.

STATUTES INVOLVED

The pertinent statutory provisions include those set forth at Pet. App. D, 47a-49a. In addition, Section 2 of the Natural Gas Act, 15 U.S.C. 717a, provides in pertinent part:

* * * *

> (6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.
>
> (7) "Interstate commerce" means commerce between any point in a State and any point out-

side thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

* * * *

STATEMENT

The Federal Power Commission in this case concluded that the International Paper Company's ("IP") transmission of natural gas through its own pipeline from Louisiana to its paper plant in Mississippi was "transportation of natural gas in interstate commerce" within the meaning of Section 1(b) of the Natural Gas Act, 15 U.S.C. 717(b), and subject to the Commission's jurisdiction. Accordingly, the Commission ordered (Pet. App. 34a) IP to file an application for a certificate of public convenience and necessity pursuant to Section 7(c) of the Act, 15 U.S.C. 717f(c). Upon IP's petition for review, the court of appeals unanimously affirmed (Pet. App. 1a-18a) the Commission's order and a related district court judgment dismissing a suit brought by IP against the Commission under the Freedom of Information Act, 5 U.S.C. (Supp. V) 552-554.

Background. The underlying facts have been stipulated by the parties. Prior to 1963, IP purchased, pursuant to a standard gas sales contract, all the natural gas required for its paper plant in Natchez, Mississippi, from the Humble Gas Transmission Company, a pipeline company subject to the Commission's jurisdiction (Pet. App. 3a, 23a).

In 1963, IP and Humble Oil & Refining Company [1] agreed that IP would purchase a substantial amount of its gas requirements from Humble Oil's gas processing plant in Louisiana, which gas would be transported through a 17.83-mile pipeline to be built and financed by Humble Oil.[2] In 1964 title to the pipeline was conveyed to IP, and by 1967 three quarters of IP's requirements were supplied through this pipeline (Pet. App. 3a, 24a).

Commission proceedings. Upon learning of IP's ownership and operation of the 17.83-mile pipeline, the Commission's Bureau of Natural Gas requested that IP either apply for a certificate of public convenience and necessity or seek a disclaimer of jurisdiction (Pet. App. 3a). When IP failed to comply with this request, the Commission issued an order in September 1967 directing IP to show cause why its transportation of natural gas should not be subject to the Commission's jurisdiction and why IP should not be required to apply for and obtain a certificate of public convenience and necessity (Pet. App. 4a, 21a). Thereafter, IP requested the Commission's Secretary to make available to it all staff memoranda to the Commission in three earlier disclaimer

---

[1] Humble Oil and Refining Company and Humble Gas Transmission Company are subsidiaries of Standard Oil Company of New Jersey (Pet. App. 23a).

[2] Under the agreement, IP is obligated to purchase certain quantities of gas from Humble. If it ceases to purchase these volumes, IP must reimburse Humble to the extent of the unamortized remaining balance of the pipeline's cost, as determined by an agreed formula (Pet. App. 3a).

cases.[3] After a hearing, the Commission denied the requested disclosure (Pet. App. 4a, 25a, 38a-39a).

Since there was no need for an oral hearing in light of the stipulation of facts, the hearing examiner issued his decision following the filing of briefs. He concluded that IP was a natural gas company within the meaning of the Act and was required to secure a certificate for the continued operation of its pipeline (Pet. App. 22a).

The Commission agreed with these conclusions and affirmed the examiner's decision (Pet. App. 21a-34a). Two of the cases relied on by IP, *Transcontinental Gas Pipe Line Corp.*, 33 FPC 237, affirmed *sub nom. Public Service Electric and Gas Co.* v. *Federal Power Commission*, 371 F.2d 1 (C.A. 3), certiorari denied, 389 U.S. 849, and *Jersey Central Power & Light Co., supra*, were distinguished by the Commission on factual grounds (Pet. App. 31a-32a); a third, *Anchor Hocking Glass Corp., supra*, along with its progeny, was overruled because of a "modified statutory standard"[4] and "accumulated experience" (Pet. App. 33a). Accordingly, the Commission ordered IP to file an application for a certificate of public convenience and necessity (*id.* at 34a).

---

[3] *Anchor Hocking Glass Corp.*, 2 FPC 930; *Jersey Central Power & Light Co.*, 9 FPC 717; *The Montana Power Co.*, 10 FPC 950. Subsequently IP sought similar documents in a fourth case, *Reynolds Metals Co.*, unreported letter order, March 27, 1959, and this request was also denied (Pet. App. 39a). This request was twice renewed and again denied (Pet. App. 25a-26a, 39a-40).

[4] The Natural Gas Act was amended subsequent to the disclaimer of jurisdiction in *Anchor Hocking* (Pet. App. 32a).

In its petition for rehearing, IP claimed, in addition to its contentions on the merits, that a provision of the Administrative Procedure Act, 5 U.S.C. (Supp. V) 554(d), had been violated in that the Commission's General Counsel and an Assistant General Counsel had not only participated in the investigation and prosecution of IP, but had also participated in an advisory capacity to the Commission when it reviewed the case and prepared its decision (Pet. App. 4a). The Commission denied IP's petition for rehearing (Pet. App. 34a-35a).

District court proceedings. On the same day IP petitioned in the court of appeals for review of the Commission's decision, IP sued the Commission in the district court under the Freedom of Information Act, seeking production of the staff memoranda previously denied it by the Commission as well as all staff memoranda to the Commission on IP's earlier motions for production of documents and summary decision (Pet. App. 40a-41a). The district court granted the Commission's motion for summary judgment, holding that the requested records fell within the provision of the Freedom of Information Act specifically exempting from disclosure (5 U.S.C. (Supp. V) 552(b)(5)):

> * * * intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

Moreover, the court held that the documents were protected by the attorney-client privilege (Pet. App. 42a-43a).

Court of appeals decision. In a consolidated appeal, the court of appeals unanimously affirmed both the Commission's and the district court's decisions (Pet. App. 1a-18a). Relying on this Court's decision in *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464, the court held that the use of the word "transportation" in Section 1(b) of the Natural Gas Act, 15 U.S.C. 717(b), was intended to bring within the Commission's jurisdiction the interstate transportation of natural gas by a company for its own use (*id.* at 6a-7a). The court was of the opinion that if contract arrangements such as IP had with Humble Oil were to become widespread and escape Commission jurisdiction, the purposes of the Act would be defeated (*id.* at 9a). The court found no impropriety in the Commission's overruling the earlier line of decisions beginning with *Anchor Hocking, supra* (*id.* at 11a-13a).

On the Freedom of Information Act issue, the court agreed with the Commission and district court that the requested staff memoranda were exempt from disclosure under 5 U.S.C. (Supp. V) 552(b)(5) and would also be exempt from discovery in civil suits (*id.* at 15a-18a). The court stated that disclosure of the materials would have been inconsistent with the basic policy, recognized by the Act, of "encouraging full and candid intra-agency discussion, and shielding from disclosure the mental processes of executive and administrative officers" (*id.* at 17a).[5]

[5] The court found that the documents sought to be obtained could not be construed as part of the Commission's final

Finally, the court rejected IP's contention that the Commission's General Counsel and Assistant General Counsel had improperly advised the Commission after having participated in the investigation and prosecution of IP. The court held that IP had waived the point by failing to raise it prior to its petition for rehearing and, in any event, could not have been prejudiced by the alleged irregularity since all the facts in the case had been stipulated (*id.* at 14a-15a).

ARGUMENT

The decision below is correct. There is no conflict with decisions of this Court or other courts of appeals or any other reason for further review.

1. IP's contention (Pet. 6-11) that the court below erred in construing Section 1(b) of the Natural Gas Act, 15 U.S.C. 717(b), to reach IP's interstate transportation of gas for its own consumption is without merit. As this Court noted in *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464, 468-469 & n. 9, Congress has shown a clear intent to subject facilities for the interstate transportation of natural gas to federal regulation. In *East Ohio*, a gas company had argued, as IP argues now, that its transportation activities were outside the reach of the Natural Gas Act because that Act was intended to reach only those matters which, under earlier deci-

---

order. *American Mail Line, Ltd.* v. *Gulick*, 411 F. 2d 696 (C.A.D.C.), where a memorandum had been incorporated into a final agency order, was thus distinguished (Pet. App. 17a-18a).

sions of this Court (*e.g.*, *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83), had been held to be beyond the regulatory power of the states. Rejecting the contention that the Act was so limited, this Court held that the gas company's transportation activities were within the express provisions of Section 1(b) of the Act. 338 U.S. at 472-474. IP seeks to distinguish *East Ohio* (Pet. 10) on the ground that the interstate transportation of gas there involved was *not for the gas* company's own consumption, but was for resale by the company directly to consumers and thus clearly was "in interstate commerce" within the meaning of Section 1(b) of the Act. There is no basis, however, for such a narrow construction of the commerce requirement. See *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U.S. 682, 688. The court below thus correctly concluded that IP's transportation of natural gas from Louisiana to Mississippi was subject to Commission jurisdiction.

Contrary to IP's assertion (Pet. 12-13), the decision below does not conflict with the Third Circuit's decision in *Public Service Electric and Gas Co.* v. *Federal Power Commission*, 371 F. 2d 1, certiorari denied, 389 U.S. 849. That case involved a refinery's 4½ mile, lead-in line from an interstate natural gas pipeline to the refinery. The Third Circuit, affirming the Commission, agreed that the lead-in line, which was located entirely within one state, was a refinery facility requiring no certificate for operation. Unlike IP's specially built interstate pipeline, the refinery's line was an integral part of the plant which served

the plant's general needs and was located entirely within the consuming state.

2. The court below was also correct in holding that the Commission could properly overrule earlier decisions which it believed it should no longer follow. Neither in matters of jurisdiction, *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672; *Federal Power Commission* v. *Union Electric Co.*, 381 U.S. 90, nor in matters of policy, *Permian Basin Area Rate Cases*, 390 U.S. 747; *Texas Eastern Transmission Corp.* v. *Federal Power Commission*, 414 F.2d 344 (C.A. 5), certiorari denied, 398 U.S. 928, is the Commission bound to earlier adopted positions when, as here, it has proper reasons for overruling them. This is especially true where the cases relied on as precedent were disposed of on a consent basis and the reasons for the Commission's action were not articulated (Pet. App. 12a, 32a).

3. With respect to IP's claim (Pet. 13-15) that various staff memoranda should have been furnished under the Freedom of Information Act, we rely on the detailed discussion of this issue by the court of appeals (Pet. App. 15a-18a).

4. Finally, IP contends (Pet. 15-16) that the court below affirmed the Commission's denial of its separation of functions argument on a ground—waiver—not asserted by the Commission. However, the court's decision on this point, on which we rely, was not limited to a discussion of waiver, but was also based on its conclusion that IP could not have been prejudiced by the alleged improper conduct in this case where all

the facts had been stipulated (Pet. App. 15a). In any event, the Administrative Procedure Act does not require separation of functions in proceedings of this kind. See 5 U.S.C. (Supp. V) 554(d).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

GORDON GOOCH,
General Counsel,

J. RICHARD TIANO,
Assistant Solicitor,

GEORGE P. LEWNES,
Assistant General Counsel,

MICHAEL S. LANG,
Attorney,
Federal Power Commission.

JULY 1971.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 438485 26